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MEMORANDUM FOR: Office of Legislative Counsel
FROM :
Assistant General Counsel
SUBJECT : S. 2525--Proposed Charter Legislation - Title II -
Restrictions - Issues Paper

Attached is a paper which attempts to identify the bulk of the "issues" which appear to be presented by Title II of S. 2525, the proposed intelligence charter legislation. I am furnishing this to you in order that it might be circulated to appropriate offices within the Agency for coordination as soon as possible. We should allow as much time as we can for those offices to review this paper and Title II, especially since they will be called upon shortly to review a similar paper on Title I, and since we are under a 28 March deadline for submission to the D/DCI/RMS of coordinated papers on all the titles.

Attachment



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ISSUES - TITLE II - RESTRICTIONS

1. The title more accurately should be "Limitations on Intelligence Activities," and Section 201 amended to cite it as the "Intelligence Limitation Act of 1978." Constitutional rights are not the subject of this Title.
2. Section 202(1) should be amended by changing "information" before "and conduct of the foreign policy" to "formulation."
3. Section 202(2) should be rewritten as follows:
 - (2) Intelligence activities within the U.S. or directed against U.S. persons abroad should be subject to appropriate limitations and controls to ensure such activities are conducted in accordance with the Constitution, and laws of the U.S.; and . . .
4. Section 203(4) should be deleted and 203(3) should read:
 - (3) To establish comprehensive statutory standards and procedures for U.S. intelligence activities as well as effective remedies to ensure such activities are conducted in accordance with the Constitution and laws of the U.S.; and . . .
5. All definitions now in Title I and Section 204 of Title II should be placed together in Title I, and all restrictions now in Title II and Sections 241 to 246 of Title I should be placed together in Title II.
6. The definition of "confidential records" in 204(b)(2) should be revised to "any documents or information the disclosure of which is limited or prohibited by law."
7. The definition of "covert human source" in 204(b)(3) should be revised to "any person who is directed to collect specific information or material concerning any U.S. person by any entity of the intelligence community, with or without compensation, without disclosing the relationship with such entity."
8. "Foreign organization" in 204(b)(6) should be simply defined as "any corporation, unincorporated association, or other group which is not a U.S. person." If this change is not made, the definition should be conformed to the definition of "U.S. person" in Title I, 104(31)(D), by adding to (B) "or which is controlled or directed by a foreign power."

9. "Foreign person" in 204(b)(7) similarly should be defined as "any foreign power, foreign organization, or any individual not a U.S. person."

10. Subsection (D) of the definition of "foreign power" in 204(b)(8) should be revised, partly to conform to 104(31)(D), to read:

Any corporation, whether incorporated in the U.S. or not, which is directed or controlled by any of the entities described in (A), (B) or (C).

11. The words "United States" should be inserted before "person" in 204(b)(9).

12. Section 204(b)(10) should be modified by deleting "central" before "files of the CIA," "the central files of" before "the Department of State," and "central" before "files of any other Federal agency."

13. The Attorney General should not be inserted into Agency management and 205(a)(1) and (2) should not require Attorney General approval or evaluation of "regulations." If the Attorney General is required to approve and evaluate all DNI and agency procedures issued to implement the statute in (1), and all those relating to intelligence activities in (2), there should be no need also to review the regulations based upon those procedures.

14. Section 205(b)(2) seems to be a very awkward way to require that the person assisting the Attorney General in intelligence matters must be appointed by the President and confirmed by the Senate.

15. Section 211(a) should state that no U.S. person information may be "retained, used, or disseminated" in addition to "may be collected" except as allowed under that part. Subsections (b) and (c) should also add retention, use, and dissemination to collection.

16. Section 211(b) should make clear that consent obviates any of the Title's restrictions.

17. Section 211(d) must be qualified by adding "in a timely manner" after "the information sought."

18. The phrase "subject to the approval of the Attorney General" should be deleted from 212 since appropriate review is provided in 205(a)(1).

19. Section 212(2) should include "in a timely manner" after "or foreign persons within the U.S."

20. The intention of Section 213 should be made more clear by revising the introductory statement as follows:

The collection of counterintelligence or counterterrorism intelligence concerning any U.S. person may be initiated when such person --

21. Section 213(2) should include "or any international terrorist activity" before "outside the U.S.," and 213(3) should refer to persons acting "on behalf of" rather than "in an official capacity for" foreign powers, and should include "foreign" before "organization."

22. Section 214 also should be revised to conform to 213, to remove any a priori determination of significance, and to make clear its intention by stating:

The collection of foreign intelligence concerning any U.S. person may be initiated when such person --

23. Section 214(3) should refer to persons acting "on behalf of" a foreign power or "foreign organization" to conform to 213(3).

24. There should be an additional subsection (5) to 214 which allows that "such collection also may be initiated in the circumstances described in Section 219 of this Title."

25. Section 215 should begin by stating that "Techniques utilized for the collection of information concerning any U.S. person as authorized by this subpart, shall conform to the requirements of Section 211." The next sentence (now the first sentence) should begin by stating "Whenever it becomes necessary to utilize the following techniques to collect" This would make clear that collection is not limited to the techniques in 215.

26. Section 215(1) should be deleted and 215(5) amended to provide:

requests for information, in accordance with applicable law, pertaining to employment, education, medical care, insurance, telecommunications services, credit status, taxes, or other financial matters, for purposes other than identification, from the confidential records

27. In addition, section 215(2), (3), (4), and (5) should not be grouped together with electronic surveillance, physical searches, and mail opening since there is no reasonable relationship between the former and the latter groups of activities in terms of intrusiveness and no legal justification or Constitutional imperative for imposing the same restrictions on both categories of activities. Subsections (2), (3), (4), and (5) should be moved to a new subsection (b) and their use made subject to procedures, established by the head of each entity and approved by the Attorney General, which shall allow approval by the head of the entity of the intelligence community where the person is an employee of that entity. Also, since "covert human source" will be defined to include "direction," 215(3) should be modified to read merely "covert human sources for purposes other than identification."

28. The relationship of Section 216(a) to 213 and 214 should be clarified as follows:

The initiation of collection under the authority of Sections 213 or 214 must be approved by a properly designated official of the appropriate entity of the intelligence community. Such approval may authorize collection to continue for no more than a 90-day period, but may be renewed in writing by such an official for an additional 90-day period.

The changes suggested throughout regarding "periods" should make it more clear that each initiation of collection is allowed that number of days and not that, for example, only 90 days of foreign intelligence collection is authorized, unless renewed, over the lifetime of any U.S. person.

29. Section 216(b) should provide for continuation by written findings every additional 90 days.

30. Section 216(c) should be rewritten as follows:

The Attorney General, or when the subject of the collection is an employee of an entity of the intelligence community or a member of the Armed Forces, the head of the appropriate entity or the appropriate service Secretary, respectively, shall review each collection activity authorized under this subpart which has continued for a period of 360 days, and any such activity shall be terminated unless the reviewing official finds, in writing, that its continuation is necessary and reasonable.

31. Section 217 requires revision, among other things, to conform to the changes outlined above. Subsection (1) should read "the degree of intrusiveness of the collection or the use of particular techniques, or their continuation;" since we should not have officials finding degrees of violations of individual rights. Subsection (3) should state "the credibility and specificity of available information which indicates the subject satisfies the standards for collection, or its continuation, under this subpart." Subsection (4) should be deleted and incorporated into (2) as follows:

(2) the importance of the information sought, including, but not limited to, the likelihood, immediacy, or magnitude of any harm or damage to persons, property, or the interests of the U.S.

32. Section 218(a) should be revised as follows: "The collection of information may be initiated and continued for not more than an 180-day period" Section 218(a)(1) should refer to "a recruitment effort for intelligence activities on behalf of a foreign power . . .," rather than requiring involvement of an intelligence service in each instance. "Collection" should be deleted between "intelligence" and "activity" in 218(a)(2).

33. There should be a new section 218(b) which allows for renewal and review of such collection activities as provided in 216(b) and (c). It is fatuous to believe that foreign intelligence services and terrorist groups cannot understand English and will not, accordingly, tailor their operations so that the actual approach or some other essential aspect of their operations is conducted 185 days after they have determined such a collection activity has been initiated. In fact, it might be in their interests to ensure that the U.S. intelligence community is made aware of an operation of this nature in order to start the "clock" running. Similarly, the existing (b) should be revised to require informing the subject and obtaining consent within the first 180-day period, except as provided in (1) and (2), and to allow continuation beyond that 180-day period where such consent cannot be obtained or has been refused and there is a written finding of necessity and reasonableness of continuation.

34. Subsection (3) of 219 should be moved up to become (2) and the word "voluntarily" deleted to avoid needless confusion as to its meaning. The existing (2) should become (3) and be revised to read: "information collected in the course of such interviews concerning the activities of the U.S. person is limited to information necessary to understanding"

19. Section 212(2) should include "in a timely manner" after "or foreign persons within the U.S."

20. The intention of Section 213 should be made more clear by revising the introductory statement as follows:

The collection of counterintelligence or counterterrorism intelligence concerning any U.S. person may be initiated when such person --

21. Section 213(2) should include "or any international terrorist activity" before "outside the U.S.," and 213(3) should refer to persons acting "on behalf of" rather than "in an official capacity for" foreign powers, and should include "foreign" before "organization."

22. Section 214 also should be revised to conform to 213, to remove any a priori determination of significance, and to make clear its intention by stating:

The collection of foreign intelligence concerning any U.S. person may be initiated when such person --

23. Section 214(3) should refer to persons acting "on behalf of" a foreign power or "foreign organization" to conform to 213(3).

24. There should be an additional subsection (5) to 214 which allows that "such collection also may be initiated in the circumstances described in Section 219 of this Title."

25. Section 215 should begin by stating that "Techniques utilized for the collection of information concerning any U.S. person as authorized by this subpart, shall conform to the requirements of Section 211." The next sentence (now the first sentence) should begin by stating "Whenever it becomes necessary to utilize the following techniques to collect" This would make clear that collection is not limited to the techniques in 215.

26. Section 215(1) should be deleted and 215(5) amended to provide:

requests for information, in accordance with applicable law, pertaining to employment, education, medical care, insurance, telecommunications services, credit status, taxes, or other financial matters, for purposes other than identification, from the confidential records

35. Section 220 should read:

The collection of information concerning any U.S. person who has contact with any person reasonably believed to be engaged in espionage or any other clandestine intelligence activity may be initiated and continued for not more than a 90-day period, provided that such collection is limited to that necessary to identify the U.S. person, to determine whether that person may be cooperating in such activities, whether that person has, has had, or will have access to any information, disclosure to a foreign power of which could be harmful to the U.S., and whether the matter should be referred to an appropriate law enforcement agency, at which point the collection shall end.

As with 218, there should be an added subsection (b) which provides for an extension in very limited circumstances, such as based upon a written finding that it has been impossible for some reason or another to make any or all of these determinations within the 90-day period.

36. Section 221 should read:

The collection of information may be initiated and continued for a 90-day period concerning any U.S. person who is reasonably believed to be a potential source of information or operational assistance, without such person's consent, but only to the extent necessary to determine such person's suitability or credibility. Such collection shall be limited to publicly available information, national agency checks, requests for information from the records of any federal, state, or local law enforcement agency or other records, and interviews

Subsection (2) should be amended to read "There is a reasonable belief that such person may be used as a source" Subsection (b) should read "Such a request would present a risk that the activity for which information or assistance is desired, or any other intelligence activity, would be jeopardized should such person be determined to be not suitable or credible." In addition, 221 should require that information collected under its authority be destroyed after one year where the subject of the collection is not actually used for that purpose.

37. Section 222(a) should state:

The collection of information may be initiated by an entity of the intelligence community concerning any U.S. person who is or may be allowed access to classified or intelligence sources and methods information or may be allowed within, or on the grounds, or in the immediate vicinity of any installation of that entity, without such person's consent, in order to determine whether that person should, in accordance with any rule or regulation of the installation, be denied such access, or be excluded from the installation, its grounds or immediate vicinity. Such collection shall be limited to physical surveillance of that person, national agency checks, requests for information from the records of any federal, state, or local law enforcement agency or other records, and interviews.

Subsection (b) should also be rewritten to conform to the "collection may be initiated" format and should be amended by inserting "property, documents or other materials" between "installation" and "or of any personnel" In addition, (b)(3) should be revised to allow "requests for information from the records of any federal, state, or local law enforcement agency or other records;" and Subsection (c) should be rewritten to conform to the "collection may be initiated and continued for a 180-day period" format and should include "or intends to violate" after "has violated," and the words "or intelligence" before "sources and methods." Further, the last two sentences should read:

Such collection may be renewed for additional periods of 180 days but only with the written approval of the head of the entity. Techniques utilized in such collection shall conform to the requirements of Section 211. The use of the following techniques with respect to any such employee, contractor or contractor employee must be approved in writing by a properly designated official of the entity --

Subsection (c)(1) should be deleted. Subsection (c)(3) should read "covert human sources for purposes other than identification." The existing subsection (c)(5) should be revised in the same way as was suggested regarding 215(5) above.

38. Sections 225 and 225(1) should read:

The collection of information may be initiated and continued by an entity of the intelligence community concerning any foreign person for foreign intelligence, counterintelligence or counterterrorism purpose if --

(1) Such person is, or the circumstances of such person's presence in the U.S., make it reasonably likely such person may be expected to become an officer or employee of any foreign power or foreign organization;

Since foreign persons in the U.S. are not mentioned in either the heading or the body of Part C, Sections 231 through 233, it is presumed there are no limitations on retention or dissemination of information collected under the authority of Section 225.

39. Unless Section 222 is amended to allow collection to applicants, employees, contractors and contractor employees, as suggested above, Section 231 will not allow, even under (a)(1), the retention of information as to such persons without their consent in all cases. "Without such person's consent" should be deleted at the end of 231(a) and reinserted at the beginning before "information." "Approved" in 231(a)(1) should be amended by substituting "initiated and continued" for "approved." Section 231(a)(6) should not be limited to "the incumbent" of a high U.S. Government position, else we will have to scour records every time a job changes hands, and especially when an Administration changes. This subsection should instead refer to information which identifies an official of the U.S. with significant responsibility for the conduct of U.S. defense or foreign policy.

40. Since "private information" has been parenthetically defined in Section 231(a) to include the absence of consent as suggested above, Section 232(a) should merely state "Private information may be disseminated only in accordance with this Section and other applicable law." Delete "information's importance" in (c) and substitute "information." There should be a new subsection paralleling Section 231(a)(6), or there should be added at the end of 232(c), "or the information is foreign intelligence, counterintelligence or counterterrorism intelligence which identifies an official of the U.S. with significant U.S. defense or foreign policy responsibilities." The word "direct" in Section 232(d)(1) and (d)(2) should be deleted. The "and" in Section 232(d)(2) should be changed to "or." Section 232(e)(2) should substitute "is approved by the Attorney General" for everything after "dissemination." Insert "or intends to grant" after "granted" in Section 232(f).

41 Section 233 should be entitled "Other Permissible Retention and Dissemination." The Section should state:

Private information collected by a means or in manner prohibited by this Act must be destroyed as soon as possible after its identification. Where necessary, however, such information may be retained or disseminated only for purposes of oversight, accountability, or redress, or where it evidences imminent danger to the physical safety of any person provided that such information may be disseminated only to appropriate law enforcement or other officials

In addition, the words "matter or" should be inserted between "criminal" and "proceeding" in the last sentence. Subsection (b) should be deleted since congressional access is provided throughout the bill, oversight is provided in subsection (a), and (b) is unnecessary and may be seized upon to provide rights of access additional to those specifically stated elsewhere. "Clearly" should be deleted from its present place in subsection (c) and be inserted instead between "not" and "permit."

42. There should be an additional subsection in section 233 which should provide:

(d) This part shall not be construed to prevent the processing, retention, or dissemination of information as necessary to determine whether its retention or dissemination is authorized by this Act, information which is the subject of a request specifically approved by the Attorney General, information necessary to preserve and maintain the integrity of technical data bases so long as access is limited to that purpose, or raw data in whatever form.

43. In Section 241, the phrase following "conducted" should be rewritten as follows -- "for the purpose of limiting, disrupting, or interfering with . . . , " or "solely" should be substituted for "so as" in conformance with the first part of the Section.

44. The words "intelligence service" should be replaced with "government" in Section 241(1). The intent of Section 242(2) is unclear. Should "in protecting against" be included after "engaged?" Also, "espionage, clandestine intelligence activities, narcotics production and trafficking" should be included in the enumeration of activities in (2). Section 242(3) should include "or for any organization or activity maintained or conducted by such an entity" at its very end.

45. The approach of Section 243 is wrong. The provision should not say, as it does now, that these activities are illegal but may be authorized by the Attorney General. Instead, the Section should state that activities undertaken on behalf of the Government, for a legitimate governmental purpose, and subject to conditions such as those stated in (1), (2) and (3), are not illegal and do not violate the criminal statutes. Subsection (3) should include "clandestine intelligence activities and narcotics production and trafficking" in its enumeration of activities. This comment as to this Section and Section 242 also makes it necessary to revise Section 213(1) to include U.S. persons engaging in "foreign aspects of narcotics production and trafficking" among those about whom foreign intelligence, defined in Section 104(13) to include such information, may be collected.

46. There should be inserted in Section 244(a), before "on behalf of an entity . . .," the phrase "for the purpose of influencing the lawful activities of the organization or its members." In Section 244(c), the second sentence should be revised, in part, to read " . . ., and shall be conducted so as to minimize its influence upon" The last sentence should provide at its end ", or, where necessary to perform functions authorized by this Act, by other entities of the intelligence community in coordination with the FBI and under procedures established by the head of the entity and approved by the Attorney General." Section 244(d) should also be amended by substituting "to minimize its influence upon . . ." for the existing limitation. If the first change suggested above is not made, there should be a new subsection (e) allowing non-operational training and education of persons so long as approved by a designated official and conducted so as to minimize its effects on the institution.

47. Section 245(a) should include "or receive" after "provide," and "or from" after "to" before both the references to LEAA and state or local organizations. Subsection (b)(1) should also allow cooperation for "checks" on "employees and their spouses or intended spouses, contractors, and employees of contractors." Subsection (b)(2) should read, "participate in law enforcement and training activities, in accordance with this Act, to protect against espionage or any other clandestine intelligence activity, which involves or may involve a violation of the criminal laws of the U.S.," Subsection (b)(3) should also include "or receive" after "provide," "or from" before "any federal law enforcement agency," and "or from state or" instead of "support."

48. The words "biomedical and behavioral" should be inserted after "or conduct" in the first sentence of Section 246 to indicate more clearly the reach of this restriction.

49. The proposed amendment of 18 U.S.C. 2235 presented in Section 251(a) is unacceptable. There should be no threat of a penalty hanging over persons who have obtained a court order. The whole purpose of requiring such an order is to ensure proper consideration and justification and to allow reliance upon such an order without threat of subsequent personal criminal liability, or even charges, based upon some dissatisfaction with the underlying record.

50. The proposed amendment of 18 U.S.C. 2551 in Section 252(a) should be revised by substituting "biomedical or behavioral research" for "the use of a" after "authorizes;" deleting "for experimentation" after "human subject;" and inserting "in accordance with HEW guidelines" after "informed consent."

51. There should be inserted at the beginning of Section 253(a) after "Any person," "other than any foreign power, as defined in Section 204(8), or any agent of such a foreign power, shall have" Section 253(a)(1), (2), and (3) should include "maliciously" or "recklessly" before "authorizes." It is unclear how (a), which provides remedies for improperly utilizing the most intrusive techniques, interacts with (c), which excludes any cause of action based upon the statutory provisions which regulate the utilization of those very same techniques. Section 253(a)(3) should include "biomedical or behavioral" before "research." The remedies provided in (b) should conform to 18 U.S.C. 2520 as follows: Delete "and general," "in," and "event" from (1) and change "no" to "not;" change "court costs" in (3) to "other litigation costs, reasonably incurred."

52. Section 253(d)(1) should state "It shall constitute a complete defense to such action that any act or omission . . . in good faith by such employee or agent." Subsection (d)(2) makes no sense as written and should have inserted after "community," "shall be presumed where the act or omission in question was based on --." There should be several additional subsections under (d)(2), as follows:

(c) In the making of such a written order or authorization, a reasonable interpretation of any statute, Executive order or directive, procedure, regulation, instruction, or other source of guidance concerning whether a particular act or omission was authorized;

(d) a reasonable belief in the legality of the act or omission in question based upon prior determinations, law, or precedent;

(e) reliance upon an appropriate court order, legislative authorization, or Attorney General opinion; or

(f) exercise of public authority.

53. Section 256 should clarify the question of whether the mere fact that the relevant information is classified prevents the statute of limitations from beginning to run until such time as it is declassified or otherwise becomes available to the public.

54. "For violations of the provisions of this Act" should be inserted after "money damages" in 257.

55. The last sentence in 258(b) should go on to state "except in any case where the court determines that the action in question is without any real basis, frivolous, brought for the purposes of harassment, or for any other improper purpose, in which case such costs shall be paid by the person or persons bringing the action."

56. "Appropriate" should be placed before "disciplinary" in 260(a), and there should be inserted at the end of the first sentence "provided that the head of the entity shall consider, before taking any such action, finding of not guilty or no liability by the court in any action brought under 253 or 254." Also, 260(c) should have "in accordance with this section" added after "taken."

57. The term "privileged communications" as used in 271 should be defined.

58. The phrase "and subject to the approval of the" should be deleted from 272. Any regulation or amendment should be provided to the Congress, if at all, "within sixty days after its effective date." Prior submission should be required only with the addition of "but the foregoing provision shall not constitute a condition precedent to the effectiveness of any such regulation or amendment." There should be an additional subsection at the end of 272 to the effect that, "Any promulgation of a standard, rule, regulation or procedure to implement this Act, shall be exempt from the provisions of section 553 of Title 5 of the United States Code, the Administrative Procedures Act."